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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MATTHEW EDMUND HATHAWAY, Defendant and Appellant.	B288002 (Los Angeles County Super. Ct. No. BA451620)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig J. Mitchell, Judge. Affirmed.

Robert Booher, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

Matthew Edmund Hathaway was convicted at separate times of possession of a controlled substance while armed with a firearm and attempted possession of contraband in jail. He contends the second conviction should be reversed and the case dismissed pursuant to *Kellett v. Superior Court* (1966) 63 Cal.2d 822 (*Kellett*) because the conduct underlying both convictions was inextricably intertwined. We conclude that although evidence of both crimes was discovered during the same investigation, Hathaway's conduct in committing them was divisible. Therefore, we affirm.

BACKGROUND

In October 2016, Los Angeles County Sheriff's Detective Michael Haggerty investigated a conspiracy to bring drugs into a Los Angeles County jail facility. While listening to recordings of phone calls made from the jail by Elden Legarda, Haggerty determined that Legarda planned with Ruby Virgen to have drugs in a sealed container transferred to Hathaway, who would transport them to an individual who would conceal them in his body and get himself arrested. In one of the calls, Haggerty heard Hathaway "clicking" a firearm.

Haggerty obtained a warrant to search Hathaway's residence for drugs and the firearm, and on October 12, 2016, found a Ruger firearm, a "miniscule" amount of narcotics, and a writing reflecting Hathaway's telephone conversations with Legarda.

Haggerty used Hathaway's phone to text Virgen and discover her location, then on October 14, 2016, served a search warrant on her residence and found packages of tar heroin and methamphetamine wrapped into a cylindrical shape that could be inserted into a rectum.

On October 14, 2016, the same day the search warrant was served on Virgen, the Los Angeles County District Attorney's Office filed a felony complaint charging Hathaway with possession of a controlled substance while armed with a firearm (Health & Saf. Code, § 11370.1) and being a felon in possession of a firearm (Pen. Code, § 29800, subd. (a)(1)).[1] He pleaded guilty to both counts and was sentenced to five years in state prison. That case is not before us.

In April 2017, six months after filing the first charges, the district attorney's office filed a felony complaint charging Hathaway with conspiracy to smuggle narcotics into the Los Angeles County jail. (§§ 182, 4573.6.)

Hathaway moved to dismiss the complaint on the ground that it constituted an impermissible successive prosecution under *Kellett*. After the trial court denied his motion, Hathaway pleaded guilty to attempted possession of contraband in jail and was sentenced to state prison for three years and six months. (§§ 664, 4573.6, subd. (a).)

After obtaining a certificate of probable cause, Hathaway appealed his second conviction.

DISCUSSION

Hathaway contends section 654 and *Kellett* bar the second prosecution, and the trial court erred in denying his motion to dismiss it.

Section 654 provides in pertinent part: "(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no

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[1] All further statutory references will be to the Penal Code.

case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other." (§ 654, subd. (a).) Section 654 "thus bars multiple prosecutions for the same act or omission where the defendant has already been tried and acquitted, or convicted and sentenced." (*People v. Davis* (2005) 36 Cal.4th 510, 557.)

In *Kellett*, the defendant was arrested for standing on a public sidewalk with a pistol in his hand. He was first charged in municipal court with a misdemeanor violation of section 417 (exhibiting a firearm in a threatening manner), but after a preliminary hearing revealed he had previously been convicted of a felony he was charged in superior court with felony possession of a concealable weapon in violation of section 12021. The defendant pleaded guilty to the misdemeanor and moved to dismiss the felony information on the ground it was barred by section 654. (*Kellett*, *supra*, 63 Cal.2d at p. 824.)

The Supreme Court issued a peremptory writ of prohibition to prevent the trial. (*Kellett*, *supra*, 63 Cal.2d at pp. 824, 829.) It reasoned: "If only a single act or an indivisible course of criminal conduct is charged as the basis of a conviction, the defendant can be punished only once although he may have violated more than one statute. Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor." (*Id*. at pp. 824-825.) The Court held that "When, as here, the prosecution is or should be aware of more than one offense in which the same act or course of conduct plays a significant part, all such offenses must be prosecuted in a single proceeding unless joinder is prohibited or severance permitted for good cause.

Failure to unite all such offenses will result in a bar to subsequent prosecution of any offense omitted if the initial proceedings culminate in either acquittal or conviction and sentence." (*Id.* at p. 827.)

The *Kellett* rule is designed to prevent harassment and to save unnecessary use of the state's and defendants' time and resources. (*In re Dennis B.* (1976) 18 Cal.3d 687, 692, 694.) Whether the rule applies "must be determined on a case-by-case basis." (*People v. Britt* (2004) 32 Cal.4th 944, 955, disapproved on another ground in *People v. Correa* (2012) 54 Cal.4th 331.) "What matters . . . is the totality of the facts, examined in light of the legislative goals of sections 654 and 954, as explained in *Kellett*." (*People v. Flint* (1975) 51 Cal.App.3d 333, 336.)

We review de novo whether section 654 and *Kellett* apply. (*People v. Valli* (2010) 187 Cal.App.4th 786, 794.)

In contrast to *Kellett*, which involved two prosecutions for possession of the same gun, Hathaway was prosecuted for crimes involving different sets of drugs. No evidence suggested that the gun and narcotics on which the first charges were predicated were related in any way to the conspiracy to take different narcotics into jail. (See *People v. Cuevas* (1996) 51 Cal.App.4th 620, 622-626 [one prosecution for possession for sale of cocaine found in the defendant's residence one day separable from another prosecution for cocaine purchased from the defendant by an undercover officer on other days]; *People v. Martin* (1980) 111 Cal.App.3d 973, 976-977 [*Kellett* did not bar separate prosecutions for possession of a sawed-off shotgun and the burglary where the shotgun had been obtained]; *People v. Valli*, *supra*, 187 Cal.App.4th at p. 801 [in separate prosecutions for murder and evading arrest, the "necessary interrelation of

murder and evading [was] missing"]; *People v. Hendrix* (2018) 20 Cal.App.5th 457, 464 [red light violation and driving under the influence were "sufficiently distinct" as to permit separate prosecution]; cf. *People v. Flint*, *supra*, 51 Cal.App.3d at pp. 335-336 [same incident furnished evidence that defendant drove under the influence a vehicle he was charged with having stolen]; *Sanders v. Superior Court* (1999) 76 Cal.App.4th 609, 612, 615 [thefts were committed at the same time]; *In re Benny G.* (1972) 24 Cal.App.3d 371, 374-375 [defendant committed and aided and abetted the same robbery].)

Hathaway attempts to characterize the possession of two sets of drugs as part of a continuous course of conduct because (1) both sets were discovered during one police investigation, (2) the district attorney knew of the second crime while charging the first, (3) the same police officers would testify as to both crimes, and (4) much of the evidence overlapped. We disagree. The "course of conduct" at issue in a *Kellett* inquiry is that of the defendant, not the police. Nothing in the record suggests that Hathaway possessed narcotics or a firearm as tools to transport other narcotics to jail.

Even were we to apply an evidentiary test as was used in *People v. Hurtado* (1977) 67 Cal.App.3d 633 and *People v. Hendrix*, *supra*, 20 Cal.App.5th at page 464, both holding *Kellett* inapplicable where evidence required to prove one crime was distinct from that necessary to prove another, we would conclude that separate prosecutions were permissible here. Although the firearm found in Hathaway's residence served as a predicate for the search warrant in Detective Haggerty's conspiracy investigation, it and drugs found in the residence would have played only a tangential role if any at trial on the conspiracy

charge. Similarly, evidence of the conspiracy would have been relevant at any trial on the possession charge only insofar as it tended to justify Haggerty's search warrant, that is, only in a procedural, not substantive sense.

Because no unified act or course of conduct played a significant part in both the possession and conspiracy offenses, we conclude section 654 does not bar prosecution of the latter offense.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, Acting P. J.

We concur:

BENDIX, J.

CURREY, J.*

* Associate Justice of the Court of Appeal, Second Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.